UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD,
Respondent,

and

Cases 36-CA-8743-1
36-CA-8789-1
36-CA-8842-1
36-CA-8849-1

EUGENE NEWSPAPER GUILD
CWA LOCAL 37194,
Charging Party.

CALIFORNIA NEWSPAPERS PARTNERSHIP
d/b/a ANG NEWSPAPERS,
Respondent,

and

Case 32-CA-19276-1

NORTHERN CALIFORNIA MEDIA WORKERS
GUILD/TYPOGRAPHICAL UNION
LOCAL #39521, TNG-CWA, AFL-CIO,
Charging Party.

BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION, INC. IN SUPPORT OF THE RESPONDENT EMPLOYERS

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The HR Policy Association (formerly the Labor Policy Association) respectfully submits this brief *amicus curiae* in the above-captioned cases dealing with the legality of workplace rules that restrict employees' use of company-provided electronic mail ("e-mail") systems. The brief urges the Board to hold that e-mail systems, like other communications tools employers furnish to employees for use in performing their work, are business implements whose use an employer lawfully may restrict as it sees fit, so

long as in doing so the employer does not discriminate on the basis of union membership or protected activity.

The brief also urges the Board to recognize that employers have compelling business reasons for limiting or prohibiting non-business use of company e-mail systems and related computer resources—*i.e.*, that employers legitimately seek, *inter alia*:

- to prevent misuse of working time that can impair employees' productivity;
- to preserve finite computer network resources for business purposes;
- to avoid problems and liabilities that can result from inappropriate e-mail use; and
- to reduce risks of e-mail borne computer viruses and security breaches.

STATEMENT OF INTEREST

The HR Policy Association ("the Association") is an organization of the chief human resource officers of more than 200 of the nation's largest private sector employers. Collectively, its member-companies employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce.

Since its founding in 1939 (as the "Labor Policy Association"), the Association's principal mission has been to ensure that laws and policies affecting human resources are sound, practical and responsive to the realities of the modern workplace. To that end, the HR Policy Association provides its members, policy-makers, courts, agencies and the public with in-depth information, analysis and opinion regarding current situations and emerging trends in labor and employment policy.

All of the HR Policy Association's member-companies are employers subject to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* As such, all have a

general stake in how the Act is interpreted and implemented. Moreover, all of the Association's member-companies have e-mail systems, which they make available to some or all of their employees for use in carrying out the employer's business.

Most, if not all, of the Association's member-companies have policies governing their employees' use of company-provided communications systems and equipment. These policies typically cover not only e-mail, but also other company computer network, Internet, telecommunications systems and related information technology and equipment.

The policies of the *amicus curiae*'s member-companies place varying limitations on employees' use of such company-provided systems and equipment, depending on each company's particular business needs and philosophy. Some prohibit all non-business use by employees. Others permit limited non-business use in accordance with specified conditions.

Some HR Policy Association member-companies' policies allow employees to make limited personal use of e-mail and other company-provided communications media only with their manager's approval. Many specify that non-business uses must be limited in frequency and duration and must not overburden or unduly impact the company's information systems or consume significant company resources. Many of the Association's member-companies forbid employee e-mail use that interferes with the working time or productivity of either senders or recipients. Some specifically prohibit "chain e-mails" or e-mails to groups of more than a specified number of recipients. Most, if not all, expressly prohibit the transmission of any material that reasonably could be considered harassing, offensive, defamatory, discriminatory, disruptive or otherwise illegal, unethical or inappropriate.

Many of the Association's member-companies' policies also expressly spell out the employer's right to monitor employee communications made using the employer's resources, in order to assure compliance with company policies and legal requirements. Thus, they expressly forewarn employees that they should have no expectations of privacy when using the employer's communications systems.

Among the principal reasons why this *amicus curiae*'s member-companies have such policies are the following:

- To ensure that their communications and information systems and equipment are used in appropriate, productive ways consistent with the company's business goals, obligations and ethical standards.
- To protect the company and its employees against potential liabilities that may result from misuse of the company's systems and/or equipment.
- To ensure that employees understand the expectations and responsibilities that surround their use of company information systems and equipment and the consequences of violations of the company's policies.

The underlying concerns that motivate the companies to have these policies include such potential problems as:

- Distribution of, or access to, inappropriate material that could be construed as sexual harassment, discrimination, defamation, or otherwise inappropriate for the workplace.
- Disruption or impairment of productivity due to excessive personal or non-work related use of these tools.

- Violation of copyrights or other intellectual property rights, privacy rights, and/or trade laws.
- Unauthorized distribution of confidential company information, such as trade secrets.
- Increased exposure of company information systems to computer viruses and other security breaches that could disrupt productivity and/or jeopardize the company's information systems.

As companies throughout the world become increasingly reliant on e-mail and other electronic systems for the transaction of business and management of information, the right of employers to adopt and enforce restrictions on employees' use of these employer-provided communications tools grows steadily more important. Thus, this *amicus curiae's* member-companies have a direct and ongoing interest in the questions of NLRA interpretation presented for the Board's consideration in this case.

STATEMENT OF THE CASE

The relevant facts have been summarized in the briefs of the parties and are not reiterated by this *amicus curiae*. We merely note that the Board has been urged in these cases to address issues surrounding the application of Sections 8(a)(1), (3) and (5) of the Act to employers' promulgation and enforcement of workplace rules that limit employees' non-business uses of employer-provided electronic mail systems. The *amicus curiae* submits, however, that there is neither any need nor any justification for the Board to forge new legal rules or doctrines to deal with these sections' application to e-mail, because the issues presented fall squarely within the ambit of existing, well-settled Board and court precedents, as detailed below.

SUMMARY OF ARGUMENT

The Board and the courts have long recognized the right of employers under the NLRA to make and enforce rules limiting employees' non-business use of employer-provided communications tools, so long as in doing so an employer does not discriminate on the basis of union membership or activity. These holdings are squarely applicable to rules limiting employees' use of employer-provided e-mail systems. Despite the popularity of the "cyberspace" metaphor, an employer's e-mail system is not a work "*place*" subject to the rule of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Rather, e-mail is a work *implement*—a tool of communication. By recognizing and treating it as such, the Board can readily and appropriately resolve the issues presented in these cases simply by applying to e-mail the same rules of law it has long applied to workplace rules restricting employees' use of company telephones, copiers, bulletin boards and other implements of communication.

Employers must be allowed to regulate employees' use of e-mail, because unrestricted use of an employer's e-mail system can severely jeopardize important, legitimate employer interests. Unrestricted e-mail use creates potential hazards to productivity and security. It can slow computer network response times and increase vulnerabilities to legal liabilities, computer viruses and security breaches. Hence, rules prohibiting or limiting use of company e-mail for non-business purposes serve valid employer business interests. Therefore, such rules must be recognized as presumptively lawful under the Act.

ARGUMENT

I. EMPLOYERS HAVE A RIGHT TO RESTRICT EMPLOYEES' USE OF E-MAIL AND OTHER COMPANY-PROVIDED TOOLS OF COMMUNICATION, SO LONG AS IN DOING SO THEY DO NOT DISCRIMINATE ON THE BASIS OF UNION MEMBERSHIP OR PROTECTED ACTIVITY

E-mail is one of many communications tools employers today provide to employees for use in performing their job duties. The legality under the NLRA of nondiscriminatory workplace rules that restrict employees' non-business use of such employer-provided communications tools is well-established.

The controlling precedents are found in a long line of cases involving rules restricting employees' use of employers' telephone systems, copying machines, bulletin boards and other implements of communication. The cases unequivocally recognize the right of an employer to make and enforce rules restricting employees' use of such employer-provided equipment, so long as in doing so the employer does not discriminate on the basis of union membership or protected activity. *See, e.g., Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) (recognizing employer's "basic right to regulate and restrict" employees' use of company copying machines); *Churchill's Supermarkets, Inc.*, 285 NLRB 138, 155 (1987), *review denied and enf'd*, 857 F.2d 1474 (6th Cir. 1988) ("employer had every right to restrict use of company telephones to business-related conversations"); *Eaton Techs., Inc.*, 322 NLRB 848, 853 (1997) (same with respect to bulletin boards).

E-mail is no different. To suggest, as some have, that e-mail is a "work area" where employees have a right to engage in solicitation during non-working time is to become carried away with the metaphor of "cyberspace." An employer's e-mail system

is not a place; it is a thing—a device the employer provides to employees for use in carrying out the employer's business. Thus, the Board can and should resolve the basic issue presented in these cases simply by applying to e-mail the same, settled rule of law it has long applied to all other employer-provided communications tools.

Indeed, there is no compelling reason to do otherwise. Employees who have access to e-mail at work today typically also have access to all or most of the more traditional means of communicating with colleagues. Moreover, with the ubiquity today of mobile telephones, handheld computers and other personal communication devices, employees in many workplaces undoubtedly have greater ability to communicate with coworkers than at any previous time in history, even without using their employers' equipment.

In any event, the ability of employees to engage in protected communications under the NLRA is not *diminished* simply because their employer furnishes them with an e-mail system but limits its use to business purposes. Although e-mail might in some instances afford employees a more convenient means to communicate about such matters, it does not follow that other available means are inadequate.

On the other hand, an employer clearly has a legitimate interest in regulating how, when and why employees use its e-mail system. First, the employer has a right to control the use of its own property. This common-sense point is expressed in clear, laymen's terms in a set of training materials one of this *amicus curiae's* member-companies prepared for use in explaining its policy on appropriate use of computer resources to its employees. Framed in the format of "frequently asked questions" and

answers, the company's (unpublished) training materials include the following illustrative exchange:

> **"This is my personal computer. What right does [the company] have to tell me what I can store on it, what computer games I can play, or how I can use it after work hours or on the weekends?"**
>
> - We know desktop workstations and laptop computers have frequently been called "personal computers", but this terminology incorrectly implies that individual employees own these computers. That is not correct. All desktop and laptop computers are [the company's] assets or leased equipment and are paid for by [the company]. You are provided these various computer tools to help you do your job. These tools must be used in appropriate ways to support our business goals and any use of them must show ethical and professional conduct.

Second, any use of an employer's e-mail system subjects the employer to costs, responsibilities and potential liabilities. It has been suggested that use of company e-mail does not impact an employer's interests as much as use of company telephones, because e-mail received during working time can be saved and read later, when the recipient is not occupied with work. But that view is naive. As illustrated in another common-sense question and answer contained in the above-referenced training materials, *any* use of a company's e-mail system affects the company's interests, no matter when it takes place:

> **"Is it 'OK' if I use my own PC at home, my own telephone line and all my own equipment and I just log onto the [company's] network to pass through to the Internet – and I do this on my own time on a Saturday? That shouldn't be a problem for [the company] no matter where I go on my own time?"**
>
> - We understand that you are using your own computer, phone line and modem, but as long as you use a [company] computer ID and pass through our network, you are using [company] computer resources. And when a [company] user ID is observed on the Internet, you are seen as a representative of [the company] and [the company] could face legal liability for statements you may make about a competitor, any disparaging, defamatory remarks you may make, etc. In addition, any web sites or Internet bulletin boards or Internet "chat rooms" you go to, can identify you as a [company] employee by your computer account and, as such,

> your activities may reflect on [the company] as a company. Your activities could be an embarrassment to the company.
>
> - [The company's] remote access is not free. Your business unit, department or organization is paying for your [company security ID card] as well as the time you are connected to the Internet via remote access.
>
> - If you are connecting to the [company's] network without the [security ID card], for example by dialing directly into the computer on your desk at the office, you are bypassing all of the security measures taken by the Corporation and exposing our network to unnecessary risks of attack.

An employer clearly has a legitimate interest in limiting non-business use of any business equipment that costs it money to operate. And the costs of processing e-mail can be significant. Congress recognized, in enacting the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act of 2003, that accessing incoming e-mail messages, reviewing them, and deciding whether to save, respond to or discard the messages all take time and consume finite computer resources. *See* 15 U.S.C. § 7701(a)(3), (4). Although Congress' focus was on problems associated with the receipt of "spam" (*i.e.*, unsolicited commercial e-mail), the processing of all incoming e-mail messages entails these same basic steps. And as Congress recognized in the context of "spam," the cumulative costs and burdens of such processing of messages can be substantial, even if the recipients do no more than quickly scan and delete the messages. *See* 15 U.S.C. § 7701(a)(6).

Indeed, it takes time to access and review an e-mail message, even if only to determine that it is not business-related and should be deleted or saved for later consideration. An expert analysis reported in the New York Times estimated that the processing of 13.3 e-mail messages per day (said to be the number of "spam" messages received by the average worker) would consume 1.4 percent of the worker's productive time. Saul Hansell, *Totaling Up the Bill for Spam*, N.Y. Times (July 28, 2003), at C1,

col. 2. While not all non-business e-mail messages can be considered "spam," they all take time to process, even preliminarily.

Furthermore, even if e-mail recipients were able to defer all processing of non-business e-mail messages until their non-working time, their use of their employer's e-mail system would still affect the employer's interests. Once again, the training materials of this *amicus curiae's* member-company make this point:

> **"How about [Internet use] before and after work, and during lunch? Sometimes it's nice to take a break from work by browsing web sites."**
>
> - Keep in mind that [the company] is a global corporation. Your non-business activity on the network is using resources that someone else needs in order to be productive.

In other words, non-business use of an employer's computer network or e-mail system impairs productivity in more ways than one. Not only does it interfere with the productivity of employees who receive messages during working time and must spend at least a few moments dealing with them, but also it consumes computer resources that otherwise would be available to other employees who depend on the same shared network—a network that, in many global companies, is in demand around the clock for business purposes. Saving a non-business e-mail message for response during the recipient's non-working time does nothing to reduce the burden the non-business use places on the employer's finite network resources. Nor does it in any way ameliorate other potential problems associated with non-business e-mail use, such as increased exposure of the company's information systems to computer viruses and other security hazards.

II. UNRESTRICTED E-MAIL USE BY EMPLOYEES POSES MULTIPLE HAZARDS TO EMPLOYERS' LEGITIMATE BUSINESS INTERESTS; THEREFORE, RULES LIMITING NON-BUSINESS E-MAIL USE BY EMPLOYEES MUST BE RECOGNIZED AS PRESUMPTIVELY LAWFUL UNDER THE NLRA

Rules limiting employees' non-business use of employers' e-mail systems must be recognized as presumptively lawful under the NLRA, because unrestricted e-mail use by employees poses numerous, potentially severe hazards to employers' legitimate business interests. In addition to the danger of potential misuse of employees' working time, discussed above, unrestricted e-mail use by employees can litter an employer's computer system with an overload of electronic data that use up limited processing and storage capacities, thereby slowing response times and impairing the productivity of all employees who depend on the same network infrastructure. Unrestricted e-mail use also leads to increased risks of abusive or otherwise inappropriate communications among employees that may create a hostile or offensive workplace atmosphere and potentially expose the employer to liability for unlawful harassment.

Moreover, unrestricted e-mail use by employees can expose the organization to heightened risks of computer viruses and security breaches that can cause system crashes and jeopardize the confidentiality of valuable business information. E-mail is by far the most important attack vector through which computer viruses and hackers gain access to organizations' computer systems, because it is extremely difficult to prevent e-mail users from opening mail and clicking on attachments or executable links that may contain viruses or allow hackers to gain access.

Combating these dangers is an ongoing battle for organizations, such as this *amicus curiae*'s members, that operate large-scale computer networks that include e-mail

systems. A recent on-line *CERT Advisory* [on] *Email Borne Viruses* (Jan. 27, 2004) put out by the highly regarded Computer Emergency Response Team (CERT) of the Carnegie Mellon Software Engineering Institute provides examples of some recent threats to "any system running Microsoft Windows (all versions from Window 95 and up) and used for reading email or accessing peer-to-peer file sharing services," *available at* http://www.cert.org/advisories/CA-2004-02.html. The advisory notes that, if unchecked, these computer viruses can:

- harvest sensitive information from the systems they have infected;
- add, delete or modify files from infected systems;
- cause infected systems to run slowly or be rendered unusable;
- install "backdoors" allowing outsiders access to the infected systems;
- attack other systems; and
- leverage infected systems to send out unsolicited bulk mail (spam).

The CERT advisory goes on to suggest various steps organizations can take to reduce these vulnerabilities, but it makes clear that these "solutions" require constant effort and vigilance. *Id.* For example, organizations seeking to protect their information systems against e-mail borne viruses are advised to install and regularly update antivirus software, "firewalls" and "gateway filters." They also are advised to educate and constantly remind users about the dangers of opening e-mail attachments or downloading, installing or running programs of unknown origin. *Id.* Yet, "[w]ith new vulnerabilities announced almost weekly, many businesses may feel overwhelmed trying to keep current" with these hazards. Statement of J. Howard Beales, III, Director of the Federal Trade Commission's Bureau of Consumer Protection before the Information Technology

Association of America's Internet Policy Committee (Dec. 12, 2003), *available at* http://aspectsecurity.com/topten/.

Such hazards, of course, are present to some degree even when e-mail systems are used strictly for business purposes. But they increase exponentially when employees are allowed to use e-mail and other network resources for non-business purposes. Non-business communications expose the employer's network to a potential flood of incoming e-mail from unknown sources. Limiting such communications is no more than a logical corollary to one of the most basic recommendations in the CERT Advisory: "Do not run programs of unknown origin," *CERT Advisory* [on] *Email Borne Viruses* (Jan. 27, 2004), *available at* http://www.cert.org/advisories/CA-2004-02.html.

Thus, just as employers have a legitimate right to ban distribution of written materials in work areas in order to protect their production equipment and processes against the hazards created by littering, so too do employers have a legitimate right to restrict non-business use of their e-mail systems in order to protect their information systems against the hazards of system overloads, computer viruses and potential security breaches.

CONCLUSION

For the reasons detailed above, the *amicus curiae*, HR Policy Association, Inc., urges the Board to recognize the importance and legitimacy of employers' interests in limiting non-business uses of their e-mail systems, and to reaffirm the right of employers under the NLRA to make and enforce such restrictions on such use of e-mail as they see fit, so long as they do not discriminate on the basis of union membership or activity.

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May 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2004, a true and correct copy of the foregoing Brief *Amicus Curiae* of the HR Policy Association. Inc., in Support of the Respondent Employers was served by U.S. first class Mail, postage prepaid, addressed as follows:

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